

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/FLN)

**DEFENDANTS' CHALLENGES TO
PLAINTIFFS AS TO DISPUTES
ABOUT BAIR HUGGER USE IN
SECOND BELLWETHER
SELECTION CASES**

Pursuant to Pretrial Order No. 24, Defendants submit the following challenges to the information provided by Plaintiffs purporting to establish product use for all 100 cases in the Second Bellwether Selection Group. Defendants are concurrently producing documents to Plaintiffs related to these challenges. Defendants also submit additional reasons why certain cases should be excluded from the Second Bellwether Selection Group.

I. CASES THAT DO NOT MEET THE REPRESENTATIVE CRITERIA

As a threshold matter, the following five cases should be excluded from the Second Bellwether Selection Group because they do not meet the Court's representative bellwether criteria, i.e., they do not involve a Plaintiff who underwent a hip or knee arthroplasty procedure:

1. ***Anderson, Garry***, Case No. 17-cv-00101. Plaintiff Garry Anderson's claims arise from an infection he developed after a tibia procedure.
2. ***Cushman, Ramesha***, Case No. 17-cv-01074. Plaintiff Ramesha Cushman's claims arise from an infection she developed after a tibia procedure.

3. ***Lowry, Matthew***, Case No. 16-cv-02480. Plaintiff Matthew Lowry's claims arise from an infection he developed after a shoulder procedure.
4. ***Regennitter, Kevin***, Case No. 17-cv-01872. Plaintiff Kevin Regennitter's claims arise from an infection he developed after a tibia procedure.
5. ***Weinhold, Michelle***, Case No. 16-cv-03370. Plaintiff Michelle Weinbold's claims arise from an infection she developed after a foot procedure.

II. **CASES PRESENTING UNIQUE CHALLENGES**

In addition, the following three cases should be excluded from the Second Bellwether Selection Group because they involve Plaintiffs who were treated at Veterans Affairs (VA) hospitals. Securing the necessary discovery from VA hospitals and treaters is likely to be difficult or impossible as was discovered when a VA case (*Nugier*) was previously selected as a bellwether trial candidate.

1. ***Hawkins, William***, Case No. 17-cv-03294. Plaintiff William Hawkins' claims arise from an infection he developed after surgery at the Michael E. DeBakey Veterans Affairs Medical Center – Houston, Texas.
2. ***Pope, Jerry***, Case No. 17-cv-03811. Plaintiff Jerry Pope's claims arise from an infection he developed after surgery at the Martinsburg, West Virginia, Veterans Hospital.
3. ***Tolson, Duane***, Case No. 17-cv-00575. Plaintiff Duane Tolson's claims arise from an infection he developed after surgery at the Washington, D.C. Veterans Affairs Medical Center.

III. **NO PRODUCT USE**

Plaintiffs represented to the Court and Defendants that proof of product use was provided for all 100 cases in the Second Bellwether Selection Group. However, the following case included a letter from the hospital confirming that a Bair Hugger patient

warming system was *not* used. Defendants will be addressing dismissal of this case with Plaintiffs' counsel.

1. ***Payne, Bradley***, Case No. 17-cv-01801

IV. **DEFENDANTS' CHALLENGES FOR CASES LACKING SUFFICIENT PROOF OF PRODUCT USE**

As set out in Pretrial Order No. 24, Defendants challenge Plaintiffs' purported proof of product use in the following cases:

1. ***Acosta, Jeffrey***, Case No. 16-cv-02323: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
2. ***Anderson, Dale***, Case No. 17-cv-01928: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
3. ***Arnold, Terry***, Case No. 17-cv-00459: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
4. ***Beene, Robert Lee Jr.***, Case No. 17-cv-00727: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
5. ***Criswell, Leon***, Case No. 17-cv-01748: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
6. ***Cushman, Ramesha***, Case No. 17-cv-01074 (should be excluded as not representative because this case does not involve a hip or knee arthroplasty procedure): There is no specific reference to the Bair Hugger patient warming system and 3M's system does not show warming unit placement or disposable (blanket) sales at this facility prior to the surgery. No additional verification has been provided.
7. ***Davis, James***, Case No. 17-cv-03621: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.

8. ***Davis, Shirrel***, Case No. 16-cv-02679: There is no specific reference to the Bair Hugger patient warming system, and it is unclear if the form referencing warming is even checked. No additional verification has been provided.
9. ***Deardurff, Annette***, Case No. 16-cv-02457: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
10. ***Edwards, Donna***, Case No. 15-cv-04361: The only references to the Bair Hugger patient warming system are on a form and 3M's system does not show disposable (blanket) sales in the 12 months prior to the surgery. No additional verification has been provided.
11. ***Ferguson, Leonard***, Case No. 16-cv-02665: There is no specific reference to the Bair Hugger patient warming system and 3M's system does not show disposable (blanket) sales in the 12 months prior to the surgery. No additional verification has been provided.
12. ***Gee, Corliss Anne***, Case No. 17-cv-04249: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
13. ***Geiogamah, Margie Lou***, Case No. 17-cv-00365: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
14. ***Giroux, Ray***, Case No. 17-cv-04013: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
15. ***Glaze, James***, Case No. 17-cv-02574: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
16. ***Grazier, Carolyn***, Case No. 17-cv-00665: Despite that Plaintiffs submitted 70 pages of records, no evidence was submitted that references warming, generally, or the Bair Hugger patient warming system, specifically. No additional verification has been provided.
17. ***Griffin, Carol***, Case No. 17-cv-01520: There is no specific reference to the Bair Hugger patient warming system and the "warm blanket #91008768" reference in the record is not a valid serial number for a Bair Hugger patient warming system. No additional verification has been provided.

18. **Griffin, Kent**, Case No. 17-cv-01286: 3M's system does not show the Bair Hugger warming unit with the listed serial number to have been placed at the facility at issue. No additional verification has been provided.
19. **Hawkins, William**, Case No. 17-cv-03294 (should be excluded due to difficulties obtaining discovery from the VA providers, as set forth above): The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
20. **Haynes, Adelaide**, Case No. 17-cv-04258: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
21. **Henderson, David**, Case No. 17-cv-03068: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
22. **Hooper, Michael**, Case No. 17-cv-02160: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
23. **Hoxworth, Richard**, Case No. 17-cv-02105: While Plaintiff provided a letter from the facility verifying that a Bair Hugger patient warming device was used on Mr. Hoxworth, the statement is inconsistent with the anesthesia record (also submitted) where the "Patient Warmer" box is not checked.
24. **Hughes, James Raymond III**, Case No. 17-cv-02734: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
25. **Kitchens, Darletha**, Case No. 17-cv-02007: The anesthesia report submitted indicates that no warming of any kind was provided. No additional verification has been provided.
26. **Koffarnus, Todd**, Case No. 17-cv-00869: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
27. **Mayne, Judy**, Case No. 15-cv-04265: There is a discrepancy between the date of the surgery at issue between the Plaintiff's Complaint and the PFS. Plaintiffs must verify the surgery date and provide verification of product use.
28. **Moore, Douglas**, Case No. 17-cv-01922: There is a discrepancy between the date of the surgery at issue between the Plaintiff's Complaint and the PFS,

and the records submitted in support of product use. Plaintiffs must verify the surgery date and provide verification of product use.

29. ***Onkotz, Steve P.***, Case No. 17-cv-01830: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
30. ***Parker, Iris***, Case No. 17-cv-04502: The only references to the Bair Hugger patient warming system are on a form and 3M's systems does not show disposable (blanket) sales in the 12 months prior to surgery. No additional verification has been provided. Further, the hospital reported to 3M that a Bair Hugger patient warming system was not used.
31. ***Partlow, Pearlle***, Case No. 16-cv-02144: There is a discrepancy between the date of the surgery at issue between the Plaintiff's Complaint and the PFS, and the records submitted in support of product use. Plaintiffs must verify the surgery date and provide verification of product use.
32. ***Peterson, Laura***, Case No. 17-cv-00112: The only references to the Bair Hugger patient warming system are on a form and 3M's system does not show disposable (blanket) sales in the 12 months prior to the surgery at issue. No additional verification has been provided.
33. ***Pope, Jerry***, Case No. 17-cv-03811 (should be excluded due to difficulties obtaining discovery from the VA providers, as set forth above): There is a discrepancy between the date of the surgery at issue between the Plaintiff's Complaint and the records provided in support of proof of product use. Plaintiffs must verify the surgery date and provide verification of product use.
34. ***Potter, Barbara***, Case No. 17-cv-01945: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
35. ***Prendergast, Jeffrey***, Case No. 17-cv-03692: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
36. ***Ramirez, Julio***, Case No. 17-cv-01078: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
37. ***Regennitter, Kevin***, Case No. 17-cv-01872 (should be excluded as not representative because this case does not involve a hip or knee arthroplasty

procedure): The only references to the Bair Hugger patient warming system are on a form document and no additional verification has been provided.

38. **Schakel, Donna**, Case No. 17-cv-03738: 3M's system does not show the Bair Hugger warming unit with the listed serial number to have been placed at the facility at issue. No additional verification of product use has been provided.
39. **Scott, Tommy Lee**, Case No. 17-cv-02931: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
40. **Spreitler, Thomas**, Case No. 17-cv-02447: There is a discrepancy between the date of the surgery at issue between the PFS and the records submitted in support of Plaintiffs' proof of product use. Plaintiffs must verify the surgery date and provide verification of product use.
41. **Storckman, Lee**, Case No. 16-cv-01201: The records submitted by Plaintiffs generically reference forced air warming, but the form is not checked, which indicates that warming was not even used. No additional verification has been provided.
42. **Sturdivant, Cennie**, Case No. 17-cv-03434: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.
43. **Swank, Karen**, Case No. 17-cv-00413: There is no specific reference to the Bair Hugger patient warming system and no additional verification has been provided.
44. **Taylor, Richard**, Case No. 16-cv-00214: 3M's system does not show the Bair Hugger warming unit with the listed serial number to have been placed at the facility at issue. No additional verification of product use has been provided.
45. **Tolson, Duane**, Case No. 17-cv-00575 (should be excluded due to difficulties obtaining discovery from the VA providers, as set forth above): The records submitted by Plaintiffs have a reference to "Thermal Unit: Bair Hugger" and "N/A" indicating warming was not even used, and 3M's system does not show disposable (blanket) sales in the 12 months prior to the surgery. No additional verification has been provided.
46. **Trice, Roma**, Case No. 16-cv-02123: The only references to the Bair Hugger patient warming system are on a form and no additional verification has been provided.

47. **Tucker, Everlene**, Case No. 16-cv-02723: There is a discrepancy between the date of the surgery at issue between the Plaintiff's PFS, the Plaintiff's Complaint, and the records submitted in support of Plaintiffs' proof of product use. Plaintiffs must verify the surgery date and provide verification of product use.
48. **Washington, Edna**, Case No. 17-cv-03763: 3M's system does not show the Bair Hugger warming unit with the listed serial number to have been placed at the facility at issue. No additional verification of product use has been provided.
49. **Weimer, Rose Ann**, Case No. 16-cv-00610: The records submitted by Plaintiffs reference a "Warming blanket PAWS" and 3M's system does not show disposable (blanket) sales, only Bair PAWS gowns. There is no reference to a Bair Hugger patient warming system. No additional verification has been provided.
50. **Weinhold, Michelle**, Case No. 16-cv-03370: (should be excluded as not representative because this case does not involve a hip or knee arthroplasty procedure): Plaintiffs provided an email from the provider that is insufficient to confirm product use.
51. **Wilson, Thomas**, Case No. 16-cv-03266: Plaintiffs provided answers to depositions on written questions from the facility that indicate the facility does not maintain this information. There are other discrepancies in the information provided, including that the "Bair Hugger" section on the form is not checked. No additional verification of product use has been provided.
52. **Wolfe, Patsy Ann**, Case No. 16-cv-01261: The only references to the Bair Hugger patient warming system are on a form document. In addition, 3M's system does not show warming unit placement at this facility prior to the surgery, and does not show disposable (blanket) sales at this address in the 12 months prior to surgery. No additional verification has been provided.

Defendants are available to meet and confer with Plaintiffs' counsel on the above challenges. Until the disputed product use issues are resolved, Defendants contend that any case where Defendants have challenged Plaintiffs' product-use evidence should not be selected as a bellwether trial case.

Defendants' challenges are made subject to, and without waiving, or intending to waive, the right at any time to revise, correct, add to, or clarify any of the challenges set forth herein.

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Respectfully submitted,

s/ Mary S. Young

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